



Epilogue

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EPILOGUE

JUSTICES UPHOLD “MUST CARRY” BROADCAST RULES

The cable television industry narrowly lost the legal battle over which channels its customers must receive. On March 31, 1997, the Supreme Court upheld the federal rules that require cable systems to carry local broadcasts.

The cable companies argued that the rules violated their free-speech rights by forcing them to devote space on cable boxes to channels they do not want to carry. However, the Justices stated that cable poses such a serious threat to broadcast television that some regulation is justified. Roughly forty percent of American homes that do not receive cable would suffer if the cable industry forced broadcast television stations out of business. The decision was 5-4 affirming the “must carry” rules. *Turner v. FCC*, No. 95-992, 1997 WL 141375 (U.S. March 31, 1997).

RICHARD JEWELL FILES LIBEL SUIT

Richard Jewell has filed suit against the Atlanta Journal-Constitution and Piedmont College for libel. The allegations arise out of stories that identified him as the Olympic Park bomber. Three days after the bombing, the Atlanta Journal-Constitution identified him as a suspect. However, Jewell was never charged with any crime and was later cleared of any suspicion by the FBI.

Jewell claims in his suit that, in the weeks after the bombing, the newspaper portrayed him as a deranged individual. For example, the President of Piedmont College, where Jewell once worked as a security guard, stated in the Atlanta Journal-Constitution that Jewell was a “badge wearing zealot.” Other media organizations have already reached settlements with Jewell over such statements. CNN settled for an undisclosed amount. NBC paid \$500,000 after NBC anchor Tom Brokaw stated: “They probably have enough to arrest him right now, probably enough to prosecute him.”

While the investigation was pending, a petition was filed to release search warrant information about Jewell. While search warrant information in a pending case is generally protected, the court decided on October 23, 1996, that Jewell's involvement in the case was over and the release of the information would not hinder the remainder of the investigation of the bombing. By that time, the FBI had cleared Jewell, and media interest was rapidly fading. *Jewell Files Libel Lawsuit vs. Newspapers, College*, CHI. TRIB., Jan. 29, 1997, at A1. Bill Thompson, *Cry No More for Richard Jewell*, SAN DIEGO UNION-TRIB., Feb. 3, 1997, at B6. In *Re Four Search Warrants*, 945 F. Supp. 1563 (Ga. N.D. 1996).

FOOD LION SUES ABC FOR INVESTIGATIVE REPORTING

Food Lion, a supermarket chain, sued ABC for a segment of ABC's news magazine show *Prime Time Live* which broadcast a segment about Food Lion in November, 1992. Two news producers from *Prime Time Live* acquired jobs at Food Lion. They secretly videotaped food handling in the supermarket. *Prime Time Live* subsequently showed the videotape during a segment on food safety. Footage purportedly showed outdated ground beef being reground with fresh meat, and outdated chicken being doused with barbecue sauce, rewrapped, and put on sale in the gourmet meat section.

Food Lion lost millions in sales after the segment aired. Instead of filing a typical libel lawsuit, Food Lion alleged fraud. Food Lion argued that the employees owed a duty of loyalty to Food Lion, which they breached to serve ABC instead. The employees who made the videotapes lied on their applications to get the jobs. Also, producers at ABC had provided them with false recommendations. Food Lion further alleged that the ABC employees had trespassed during the filming of the story.

The jury agreed with Food Lion and ordered ABC to pay \$5.5 million dollars in damages. ABC plans to appeal the award which has been both praised and criticized as the surprise result of Food Lion's circumvention of traditional libel litigation. Frederic M. Biddle, *ABC Takes to the Air to Make its Food Lion Case*, THE BOSTON GLOBE, Feb. 12, 1997, at F8; *Food Lion v. Capital*

Cities/ABC. 1996 U.S. Dist. LEXIS 19235, 4 (M.D.N.C. 1996).

TELEVISION STATION MAY BE LIABLE FOR SUICIDE

Judith A. Clift sued Narragasset Television for causing the suicide of her husband. She claimed negligence, willful misconduct, and intentional infliction of emotional distress. The suit arises out of a television interview with her husband moments before his death.

On May 17, 1993, Clift's husband called her at work and told her that he was going to kill himself. When she got home, she found that he had turned on the gas in the home and had surrounded himself with guns. He had also cut his throat with some glass. The wife fled the home and the police arrived. The police tried to convince the husband not to kill himself.

This, in turn, attracted the attention of the local news team. A reporter called the home and interviewed Clift's husband. On the six o'clock news, the reporter made a live report from the house. The interview appeared on the air at 6:04 p.m. At 6:07 p.m., he committed suicide. When police entered the home, they found the television on and tuned to the station that had just broadcast his interview.

The television station may be liable for the death because in Rhode Island when a person's negligence causes an uncontrollable impulse in a suicidal person, that person is liable for the subsequent suicide. Whether the interviewer caused such an impulse remains to be decided. The television station filed a motion to dismiss the case, which was granted and the widow appealed. The Supreme Court of Rhode Island reversed the dismissal of the case, letting the case go to trial. *Clift v. Narragasset Television*, No. 94-594 1996 R.I. LEXIS 297 (R.I. Dec. 23, 1996).

FLORIDA INTRODUCES BILL TO ENSURE SAFE BOWLING

Florida State Representative Goode is sponsoring a bill in the Florida House to ensure that the sport of bowling becomes safer. The "Safe Bowling Act" recognizes that many people in the State of

Florida enjoy bowling and that bowling contributes to the economy of the state. Bowling, however, can be dangerous. For example, other bowlers, spectators and customers can be injured by the bowling balls. Bowlers can slip on the slick lanes and injure themselves. In addition, there are minimal safety precautions in the sport. As a result, Bowling center operators currently have difficulty obtaining liability insurance because of the high risk associated with bowling.

The Bill proposes several solutions to the insurance and safety problems faced by the bowling industry. The Bill would require each bowling center operator to post a sign stating that the operator is not liable for injuries or damage which result from the inherent risks of the sport of bowling. An "inherent risk" is the risk of injuries that result from falls, collisions or contact with the ball or other people. In addition, the bowling center operators would have to comply with safety standards promulgated by the Bowling Proprietors Association of America.

Also, all bowlers, spectators and other customers will have to refrain from acting in a manner that may cause injury. The Bill places an affirmative duty on the participants of bowling to know that there are "inherent risks" to the sport. 1996 F.L.H.B. 885.

CONTROVERSY OVER TELEVISION MOVIE

Diane Zamora has filed a petition in the Texas courts to enjoin a local television station from showing a movie based on her alleged crime. She is facing first degree murder charges. An NBC made-for-television movie, titled *Love's Deadly Triangle: The Texas Cadet Murder* was based on the events in her case. The problem with the movie, she argued, was that the movie script concluded that she was guilty. This was even more of a concern as the movie was to air before the trial and potential jurors might be prejudiced by the movie.

The criminal charges arose when the body of Adrienne Jones was found in a field in Tarrant County, Texas. Zamora and her boyfriend, David Graham, were charged with her killing. They are accused of killing Jones after Graham admitted to Zamora that he had a sexual encounter with the 16-year-old Jones. At the time of the murder, Graham was a cadet at the Air Force Academy in Colorado Springs,

Colorado and Zamora was a cadet at the Naval Academy in Annapolis, Maryland. Both have pled not guilty and both are facing capital murder trials in late 1997.

Zamora's lawyer petitioned the court to forbid the local NBC affiliate from airing the movie because of the danger that potential jurors of Zamora and Graham would see the movie and conclude that the NBC version was the correct one. A judge denied that request, but urged the local affiliate not to air the movie. NBC aired the movie on Monday, February 10, 1997, but the local affiliate did not. Deanna Boyd, *Judge Denies Request To Halt Airing of Movie About Slaying*, THE FORT WORTH STAR-TELEGRAM, Feb. 5, 1997 at 1.

ART SMUGGLING AT SOTHEY'S

Sotheby's auction house in London has suspended some senior executives for smuggling works of art from Italy to England. Peter Watson, an investigative reporter, discovered the smuggling activities of the Sotheby employees. He worked with the British documentary television show *Dispatches* to uncover the activity. On February 6, 1997, the show broadcast film taken by a secret camera hidden in a brooch. In the film, a Sotheby's executive offers to smuggle an Italian painting from Milan to London. The cost of the painting was \$16,150, and the fee for smuggling the painting into Britain would have been about \$750.

Sotheby's criticized the reporting technique, stating that using an undercover camera amounted to entrapment. Nonetheless, Sotheby's admits that their employees acted wrongly. Sotheby's maintains that the smuggling activity is an isolated incident and that it took the appropriate measures in suspending the executives to end the matter. *Sotheby's Concedes Smuggling Activity*, THE NEW YORK TIMES, February 7, 1997 at C1.

STATIC OVER SATELLITE TELEVISION

A North Carolina television station has filed suit against PrimeTime 24, a satellite television service. The television station

claims that PrimeTime 24 has engaged in a pattern of willful infringement on its copyrights. WTVD, a broadcast television station in Raleigh-Durham, seeks to enjoin PrimeTime 24 from signing up customers that live within WTVD's broadcast range. CBS, Fox, and KAMR-TV of Amarillo, Texas filed similar suits against PrimeTime 24.

The suits involve an interpretation of the Satellite Home Viewer Act, which permits satellite companies to rebroadcast copyrighted programming to viewers who can not receive non-satellite broadcasts. The suits against PrimeTime 24 allege that the satellite company's customers are actually able to receive ground-based signals from their local station. This means that viewers who could be watching local network television are watching satellite television instead in violation of the Act. The local television stations lose viewers and advertising dollars to distant markets.

In order to protect local television stations from losing viewers in this way, the Satellite Home Viewer Act allows local stations to monitor the satellite company's customers. If the stations find a home that is in the area that receives their signal, the satellite company may not use the copyrighted broadcasts of the local company.

The ability of local television stations to dictate who may get satellite delivered television is not popular with viewers. Satellite television consumers are angry about the denial of service. Groups of television watchers have filed complaints with the FCC, arguing that they should be allowed to buy satellite television if they wish. *Another Lawsuit is Filed Over Satellite Delivered TV*, SATELLITE NEWS, February 3, 1997, Vol. 20, Issue 5.

STOLEN TREASURES FROM WORLD WAR II

The dispute continues over ownership of the art treasures that were stolen during World War II. Germany stole artistic treasures from the Jews, Russia stole art from the conquered Germans, and neither wants to give the treasures back.

During World War II, the Jewish population was stripped of all possessions, including collections of art work. Some of the artworks were kept and some of them were sold. For example, Hans

Wendland, a German art dealer, was responsible for shipping looted art works into the market. During the war, he would create new histories for the art and sell them to honest buyers. Many of these pieces are in the hands of collectors who bought the paintings innocently, knowing nothing about the true history of their paintings.

Governments who hold art originally belonging to their Jewish population must decide what to do with the treasures. The Austrian government recently held an auction at Christie's of 8,000 pieces of art that had no claimants. The art originally came from Holocaust victims. The proceeds from the auction benefitted Holocaust survivors.

Russia is in possession of thousands of pieces of art that were stolen from Germany between 1945 and 1947. In February, 1997, the Russian Duma, the lower legislative house, declared that the art belonged to Russia. Russian law states that the art is compensation for the damage inflicted on the cultural heritage of Russia by the German Army. Germany, who has been pressuring Russia to return the art for years, denounced the new law. It is estimated that the art stolen from Germany amounts to more than 200,000 museum pieces, 500,000 valuable books and numerous archive pieces. One collection is estimated to be worth \$100 million. Interview of Nick Goodman by Morley Shaffer, *60 Minutes* (Jan. 19, 1997). *Russia Won't Return Art Seized in War*, *NEWSDAY*, Feb. 6, 1997 at A17.

SCHOOL BOARD SUSPENDS COACH OVER COWARDLY REMARK

A district court in Massachusetts found no First Amendment violation when Monson Public School suspended a high school soccer coach for calling the players cowards. Gerald Brayton, coach of the soccer team, told a newspaper reporter that the team was not working as hard as he wanted them to and their effort was that of cowards. In response, the Monson School board temporarily suspended him. The coach was also an industrial arts teacher but was not suspended from his teaching job. The coach filed suit against the Board alleging that his First Amendment rights of free speech and free association had been violated. The Court held that the complaint failed to state any viable constitutional cause of action and dismissed

it.

Coach Brayton claimed that the conditions of his suspension violated his right of association. In support, he noted that his reinstatement was contingent upon not communicating about soccer with the other coaches and the players. He also was ordered not to participate in related activities of the soccer team.

The Court rejected his claim. The First Amendment does not prohibit the Board from disciplining Coach Brayton for his "coward" remark, because this expression did not rise to a level protected by the First Amendment. The conditions of Coach Brayton's suspension regarding communications about soccer had no public significance. The Court stated that the relationships that enjoy the right to free association protection are vastly more intimate than the soccer coach and his team. *Brayton v. Monson Public Schools*, No. 95-30051, 1997, 1997 WL 16628 (D. Mass. Jan. 17, 1997).

WILLY SHOEMAKER RACES TO THE COURTHOUSE

Willy Shoemaker, called the world's most "winningest" jockey, sued a hospital, Ford Motor Company, the State of California and others for more than fifty million dollars. The suit arose out of the care that Shoemaker received after he was involved in a one car collision in 1991.

Shoemaker had retired from his career as a jockey a year before he drove his Ford Bronco off of a California highway. The accident left him a quadriplegic. Shoemaker claims that the highway lacked a necessary guardrail. The suit also claims that Shoemaker was the victim of malpractice after the accident. Shoemaker's paralysis is the result of that care, the suit claims. Shoemaker stated that while he is able to train horses from a wheelchair, most people do not believe that he can.

On the day of the accident, Shoemaker played golf and consumed four drinks while on the course. At the time of the accident, his blood alcohol level was .13. The legal limit for driving in California is .08. Shoemaker denies that he was drunk at the time of the accident. He was reaching for a cellular telephone when the crash occurred. He claims that drugs given to him afterwards affected his blood alcohol

level. The State of California is seeking immunity. Ford has already paid Shoemaker one million dollars and is seeking indemnity. Bill Christine, *His Day In Court Arrives*, L.A. TIMES, Feb. 4, 1997 at C1.

SETTLEMENT ALLOWS COCA-COLA TO "SURGE" AHEAD

Babson Bros. Co., from Naperville, Illinois, has settled its suit with Coca-Cola over the name of Coca-Cola's new drink. Babson manufactures dairy and agricultural equipment. It markets the equipment under the trademarked name of Surge. Surge is also the name of Coca-Cola's new drink. Surge, the soda is a "fully loaded," chartreuse colored, citrus drink resembling Mountain Dew. It has high caffeine content and low carbonation.

Coca-Cola wanted to introduce its new drink to the world during Super Bowl XXXI. Prior to the game, Babson petitioned the Northern District of Illinois to grant a preliminary injunction against Coca-Cola's use of their trademarked name. Surge was trademarked by Babson in 1925 and has been registered in more than forty countries.

Babson sought a preliminary injunction under the Trademark Dilution Act of 1995. Famous trademarks are protected from being used by other companies, even if the marks are used in different industries (such as the agricultural equipment industry and the soda drink industry). Babson, in order to obtain a preliminary injunction, would have needed to show that the "Surge" name is famous.

Coca-Cola and Babson reached a settlement before the hearing for the preliminary injunction was scheduled. The settlement affirms that there is no link between the two Surge products. Surge, the soda, went on to make its debut at Super Bowl XXXI. Babson Bros. Co. v. Coca-Cola, No. 96 C 8475 (N.D. Ill. 1996); *Trademark Dispute*, CHIC. DAILY L. BULL., Jan. 23, 1997 at 3.

VINDICTIVE INTERNET NAME USER MUST PAY ATTORNEY'S FEES

A credit card and debit card processing service was awarded attorney's fees in a trademark dispute. The service's "Cardservice"

trademark was used as an Internet domain name without the service's permission.

Cardservice International registered the name "Cardservice" in 1994. The defendant, McGee, also operated a credit card and debit card processing service called Card Service. The defendant expanded to the Internet. He registered the domain name "cardservice.com". McGee claimed that his company's name had a space between the words and it did not infringe on the registered name "Cardservice". The Internet does not allow spaces in domain names, so the name "Card Service" became "cardservice.com". Cardservice obtained a preliminary injunction to stop McGee from using "cardservice.com". While the preliminary injunction was in place, McGee acted in bad faith and with malicious intent. McGee did not disable the Internet site at "cardservice.com". Instead, he posted statements that accused Cardservice of trying to steal his domain name. McGee also used the site to steer customers away from Cardservice to its competition, which McGee called the "good guys". McGee told Cardservice that he was about to bad mouth Cardservice on the Internet.

The plaintiffs obtained a permanent injunction to stop McGee from using the names cardservice.com, card, service, card service, csi or any other variation on the Internet. Because of McGee's actions during the preliminary injunction, the plaintiffs were also granted attorney's fees. *Cardservice International, Inc. v. McGee*, No. 2:96 cv 896, 1996 WL 16795 (E.D. Va. Jan. 16, 1997).

MARTIAL ARTIST GETS KICKED

A martial artist hired to model fight scenes in the video game "Mortal Kombat" sued the game's manufacturer. The martial artist, David Pesina, claimed that reformatting the game to serve the home video market infringed his right of publicity. David Pesina was hired by Midway Manufacturing Co. to act out martial arts fight scenes to be used in the arcade version of Mortal Kombat I and II. These fight scenes were captured by a computer and incorporated into the game. David Pesina modelled the character Johnny Cage in the game. Midway produced the arcade version of the game and then licensed a third party, Acclaim, to produce the games for home video systems.

Acclaim then reformatted the games for use in Sega and Nintendo systems. Pesina claimed that the reformatted version used his name, persona and likeness without his authorization. He also claimed that the home version falsely used his endorsement, and this infringed on his common law right of publicity. The common law right of publicity prevents others from using one's name or picture for commercial purposes without his or her consent. In order to show a violation of this right of publicity, the plaintiff must show that his or her name, persona or likeness had commercial value.

Midway moved for summary judgment against Pesina. The District Court for the Northern District of Illinois granted the motion. The court stated that the plaintiff must show that he or she is famous. The court found that the plaintiff was not a celebrity from his work in the *Mortal Kombat* games. The plaintiff's own expert conceded that the plaintiff had no celebrity status or public recognition. The defendant's experts showed that Pesina was unrecognizable in his role as Johnny Cage in the game.

The court also found that there was no risk of consumer confusion. Consumer confusion is a necessary element in the claim of false endorsement. Robert Gurrola, *Martial Artist Loses Courtroom Battle With Mortal Kombat Game Manufacturer*, W. LEG. NEWS, Jan. 6, 1997 at 14006; *Pesina v. Midway Manufacturing*, 948 F. Supp. 40 (N.D. Ill. 1996).

COMPUTER USE RESTRICTIONS ON PAROLEES

The U.S. Parole Commission approved new, tighter restrictions on computer use by high-risk parolees. The new restrictions are in response to incidents involving criminal use of the Internet. High risk parolees can, by way of their computers, gain access to information about bomb making, drug trafficking, hate crime and child molestation. Parolees, as well as current prisoners, can also view child pornography on the Internet.

Under the new restrictions parolees could be required to get prior written approval to use the Internet, bulletin board systems or a public or private network. The parolees could get permission to use the Internet or other network if their parole officers find it necessary. The

new restrictions could also forbid parolees to use encryption devices. The restrictions allow parole officers to make unannounced examinations of a parolee's computer and to check on a required daily log of computer use. *Parole Commission Ok's New Computer Usage Restrictions for Parolees*, W. LEG. NEWS, Jan. 2, 1997 at 13896.

JUNK E-MAIL HAS NO FIRST AMENDMENT RIGHT

A federal court ruled that e-mail advertiser Cyber Promotions, Inc. has no First Amendment right to send unsolicited e-mail over the Internet to America OnLine ("AOL") subscribers. AOL may now block attempts by Cyber Promotions to send e-mail advertisements to its members.

Cyber Promotions sued AOL after AOL returned Cyber Promotion's e-mail. AOL changed the return path of the e-mail and sent the messages in a bulk transmission to Cyber's Internet service provider, which blocked their system. Cyber filed suit, claiming that the return of the mail by AOL was "an e-mail bomb" and violated the Computer Fraud and Abuse Act. AOL countersued. AOL claimed Cyber infringed its trademarks and service marks, engaged in false advertising and used unfair competition. AOL moved for summary judgment and Cyber sought a declaratory judgment stating that it had the right to send the e-mail. Cyber argued that AOL's function had a character similar to state action because AOL manages the access its subscribers have to the Internet.

The District Court for the Eastern District of Pennsylvania disagreed. It said that AOL did not exercise any municipal or state power or provide any kind of public service. The court found that AOL does not stand in the shoes of the state when it allows its subscribers access to the Internet. There are numerous avenues to reach the Internet. While AOL might control the access to the Internet of its subscribers, that access is not the only way for Cyber Promotion to reach the subscribers. Even after this decision, Cyber remains free to use all non-electronic forms of advertising to reach AOL members. It is still free to send e-mail to AOL's competitors, Prodigy, CompuServe and Microsoft Network. Robert Gurrola, *No First Amendment Right to Send Junk E-mail*, W. LEG. NEWS, Nov. 11,

1996 at 12000; *Cyber Promotions v. America OnLine*, 948 F. Supp. 436 (E.D. Pa. 1996).

SEATTLE'S NEW BASEBALL STADIUM SURVIVES CONSTITUTIONAL ATTACK

The Washington State Supreme Court ruled that the financing legislation behind Seattle's new baseball stadium was not subject to a voter recall referendum. The Seattle Mariners' owner said that the team needed a new, state-of-the-art stadium, and he wanted the state to pay for it. The owner said that unless King County and the State of Washington enacted financing legislation by October 31, 1995, he would sell the team. This threat made baseball fans in Seattle worry that any new owner of the Mariners would want to move the team out of Seattle. In response to the owner's threat of selling the team, the Washington governor called a special session of the legislature. For a week, both Houses of the state government devoted all of their attention to the financing plan. The financing bill passed unanimously at the end of that week.

Before the financing plan went into effect, a group of citizens known as CLEAN (Citizens for Leaders with Ethics and Accountability Now!) filed suit against the state. CLEAN wanted the financing plan to be put to a voter referendum. The referendum would determine whether the financing plan would be put in effect. The State of Washington argued that there is a provision in the state constitution that makes emergency legislation exempt from the voter referendum recall. In the Washington State Constitution, emergency legislation is defined as "a response to an immediate threat to public peace, health or safety." CLEAN argued that a new baseball stadium is not "an immediate threat to public peace, health or safety." The Washington Supreme Court ruled that the legislature's declaration of an emergency should be given substantial deference. The court said that while losing a major league baseball team is not an apocalypse, the legislature could call the need for a financing plan an emergency because of the owner's deadline. The court also noted the economic value of the Mariners. Loren Singer, *Safe at Home Plate*, W. LEG. NEWS, Jan. 6, 1997 at 14046; *CLEAN v. State*, 928 P.2d 1054

(Wash. Dec. 20, 1996).

PIRATED TAPES THREATEN MUSIC INDUSTRY

Police in New Jersey confiscated 12,000 mix tapes on the basis of copyright infringement. Disk jockeys record different songs onto a cassette tape or compact disc and then sell them on the street, at flea markets, by mail or at independent music stores. Disk jockeys typically do not get copyright permission from the artists before they record and sell the songs. This infringes the artist's copyright protection on his or her song title and makes the mix tape illegal. The mix tapes sell for much less than a legally produced album would. Representatives of the music industry report that 99 percent of the mix tapes are illegal. These tapes, however, are a free source of advertising for the artist.

One recording company, Arista, allows mix tapes of their artists to be made and sold, so long as the tapes contain only songs by Arista artists. The Recording Industry Association, however, is fighting to stop the pirated tapes. It sends cease and desist letters to the manufacturers. Tracking the manufacturers down is difficult, since most of the operations are small and easily moved. The Association also puts music venues on notice that the venues may not knowingly allow their disk jockeys to sell the illegal tapes. The Association called for the police to help them fight the pirated tapes, prompting the New Jersey raid. *DJ mix tapes getting hot, despite their illegality*, W. LEG. NEWS, Nov. 5, 1996 at 11797.

STATE DEPARTMENT REQUIREMENTS ARE UNCONSTITUTIONAL

A federal judge in San Francisco declared that government licensing requirements for certain software programs are unconstitutional. Daniel Bernstein sued the State Department twice. The first suit sought to have software programs defined as speech. The second suit sought a declaratory judgment that the enforcement of the Arms Export Control Act constituted a prior restraint of speech and violated the First Amendment.

When Daniel Bernstein was a doctoral candidate at the University of California at Berkeley in the area of mathematical cryptography, he developed an encryption software program called Snuffle. Snuffle transformed readable text on a computer into an unreadable code using a highly complex program.

The State Department has classified encryption programs as a security concern. The State Department recognized that cryptography is used to ensure confidentiality. If cryptographic computer programs are exported, the State Department might lose sources of information regarding national security. Therefore, in order to sell Snuffle outside of the United States, Bernstein had to submit a request for a license to export Snuffle from the State Department. His request for a license was turned down, and Bernstein sued. In April, 1996, the same judge in the District Court for the Northern District of California ruled that encryption programs were speech under the First Amendment and protected. This ruling allowed Bernstein to go forward with his substantive suit against the State Department. In the second suit, the court ruled that the requirements in order to obtain export privileges were a prior restraint on protected First Amendment speech and therefore were unconstitutional. *License Requirements for Cryptographic Software Export Unconstitutional*, W. LEG. NEWS, Dec. 20, 1996 at 13573; *Bernstein v. Department of State*, 922 F. Supp. 1426 (N.D. Ca. April, 1996); *Bernstein v. Department of State*, 945 F. Supp. 1279 (N.D. Ca. Dec. 1996).

PARODY AD WINS AGAINST COPYRIGHT INFRINGEMENT CLAIM

A federal judge in Manhattan granted summary judgment against photographer Annie Leibovitz's claim of copyright infringement. She claimed that an advertisement for the film *Naked Gun 33 1/3: The Final Insult* from Paramount Pictures infringed her copyright to a photograph of the actress Demi Moore. Annie Leibovitz photographed Demi Moore nude and eight months pregnant. The advertising agency hired by Paramount to promote the movie replaced Demi Moore with the actor Leslie Nielsen, the star of the *Naked Gun* movies in the parody version. When the parody was photographed, another pregnant model was used for the body. She was posed

against a similar backdrop and lighting to recreate the Leibovitz photograph. Nielsen's head was superimposed on that model's body. The ad agency digitally changed the resulting photograph to match Demi Moore's skin tone. The photograph was used to advertise the movie in several magazines, including *Vanity Fair*, which published the original Demi Moore photograph. Leibovitz wrote to Paramount, stating that the ad violated her copyright of the original photograph. When Paramount did not stop the ad campaign, she filed suit in federal court for copyright infringement.

The judge ruled that the parody did not infringe Leibovitz's copyright of the photograph. Judge Preska stated that the parody was a fair use of what had become a widely known and controversial photograph. Fair use of copyrighted material occurs when copyrighted material is used by someone without permission of the copyright holder for purposes of criticism or comment.

The parody added something distinctly new to the image. She called the parody transformative. The public had two works, she said, with a different nature and appeal, where before there had been only one. Linda Richardson, *A Parody of a Pregnant Actress Stands Up in Court*, N.Y. TIMES, Dec. 20, 1996 at B6; Bill Alden, *Parody Movie Ad Found to Be Allowable 'Fair Use'*, N.Y. L. J., Dec. 20, 1996 at A1; *Leibovitz v. Paramount Pictures Corp.*, 948 F.Supp. 1214 (S.D.N.Y.1996).

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